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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 290

AMERICAN-FOREIGN STEAMSHIP CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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(1) On three prior occasions, the United States has acquiesced in efforts to secure review of the important limitations issue raised in this case. But it now opposes the instant petition, contending that the three prior denials of review make it "clear by now that this Court views the issue as one not meriting further review here." Brief in Opposition, p. 12.

However, "the sole significance of such denial of a petition for writ of certiorari need not be elucidated to those versed in the Court's procedures. It simply means that fewer than four members of the Court deemed it desirable to review a decision . . . A variety of considerations underlie denials of the writ . . . Pertinent considerations of judicial policy here come into play. A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening." Opinion of Mr. Justice Frankfurter respecting the denial of certiorari in *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 917-918.

It cannot, therefore, now be said with the certainty exhibited by the Brief in Opposition that this Court views the issue as not meriting further review. In denying review of the issue as raised in the conditional cross-petition in No. 322, Oct. Term, 1959, *American-Foreign Steamship Corp.* v. *United States*, 363 U.S. 841, the Court may well have been impressed with the Solicitor General's statement accompanying his acquiescence:

> "The Second Circuit obviously is and has been in sharp disagreement on resolution of the limitations issue posed by these cases and by *Sword Line* and *American Eastern*, *supra*. It is equally apparent that an *en banc* decision on the limitations issue by the court below, if validly made, would be almost a prerequisite to review of the issue by this Court."

Thus the denial in that instance may have resulted from a feeling that a valid *en banc* decision, properly maturing the issue, was a prerequisite to review. So,

too, the denial of review in the *American Eastern* and *Sword Line* cases may have been motivated by the unripeness of the limitations issue at that juncture.[1] But, in any event, a valid though confusing *en banc* decision has at last been rendered and the issue has now mellowed to the point where review by this Court is appropriate. The public importance of the question and the magnitude of its impact on other pending cases—factors previously conceded by the Solicitor General to be involved—continue to exist so as to justify plenary consideration of the issue by this Court.

(2) The *en banc* determination below, however much it may be the method designed to resolve or avoid intracircuit conflicts, has not in fact created either a clear-cut result or a resolution of what the Solicitor General described as a "sharp disagreement" within the Second Circuit on the limitations issue. Certainly, to borrow words from the Brief in Opposition (p. 13), "the fact that there are a majority (including a concurrence) and a dissent does not establish" of necessity either a clear-cut result or a resolution of the conflict.

As indicated in the petition (pp. 13-14), at least four answers have been given by the Judges of the Second Circuit as to when an action arises for refund of additional charter hire under the Suits in Admiralty Act. And the result below does not clearly select any one of the four so as to provide guidance to lower courts, at least those within the Second Circuit, that must deal with similar cases awaiting authoritative determina-

[1] At the time that review of the limitations issue was declined in the *American Eastern* case, 351 U.S. 983, and in the *Sword Line* case, 351 U.S. 976, the matter had not been presented to or considered by an *en banc* Court of Appeals. The sharp conflict among the Judges of the Second Circuit was just then developing.

tion of the matter.[2] Judge Smith was of the view that the cause of action arose "immediately after signing the agreements"—a result which even he conceded was "rather harsh" and "anything but clear at that time" —or, alternatively, "immediately upon payment of additional charter hire in excess of 50% of profits—or when preliminary payments were made on the 1947 split-year accounting system." Judges Clark and Waterman clung to their original *en banc* view that the cause of action arose at the time of the preliminary payments. Judges Friendly and Moore, of course, saw the action as arising only upon the final audit—as had Judges Hand, Hincks and Medina before them.

The *en banc* determination below has thus only intensified the confusion and the intracircuit conflict. In Judge Friendly's words, this second *en banc* effort has not "led to concord or at least to a closer approach to it." Judge Smith's views stand essentially alone, his conclusion being only "negatively complete" to Judge Clark and Waterman. Preferring to restate their own views, the latter two Judges express an opinion in direct conflict with that of Judges Friendly and Moore. And out of this morass of confusion, this one-two-two determination, not even the Government attains satisfaction. Not content with the unclear resolution of the distinction between claims based on alleged illegality and those based on contract inter-

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[2] To quote the opening words of Judge Friendly's dissent:

> "It would have been a happy circumstance if the changes in the membership of the Court since these cases were last before us had led to concord or at least to a closer approach to it. Instead they have resulted in replacing the former 3-2 vote for reversal with a 3-2 vote which, broadly speaking, is for affirmance . . ."

pretation, the United States has filed a cross-petition, No. 438, Oct. Term, 1961. And that cross-petition, as if to underscore the confusion and absence of a decisive majority opinion, complains that Judge Smith—i.e., *not* a court majority composed of Judges Smith, Clark and Waterman, but Judge Smith as technically joined on the remand by Judges Friendly and Moore—has interpreted Clause 13 in an inconsistent fashion. A more appropriate situation for the exercise of this Court's power to correct an intracircuit conflict is difficult to imagine.

(3) The contention of the Brief in Opposition (pp. 14-15) that the limitations issue is not a recurring one since Clause 13 of the charter form has been "substantially changed" is without merit. While Clause 13 has been amended to eliminate preliminary payment language, the pertinent regulations applicable to current charters utilize substantially identical language (46 C.F.R. 299.31(k) and 299.39). Limitations issues of the same nature can therefore continue to arise.

Moreover, even the absence of identical contract language at this time would not destroy the importance, for certiorari purposes, of what the court below has decided by one combination or another of judges. This case is not one limited to an interpretation of particular contract language. Far-reaching issues of limitations law—including the authority of a Government agency to contract for a postponement of a cause of action—have been raised by the opinion of Judge Smith. See petition, pp. 16-21. These are not matters to be brushed aside by any technical amendments to, or elimination of, Clause 13.

CONCLUSION

For these reasons, as well as those spelled out in the petition, certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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